Provided that, without prejudice to subsection (4) of section 145, if no period of notice for the purposes of this section is stipulated by the charge, not less than thirty days' notice shall be given."

The only evidence before the court was to the effect that the respondent had executed four charges over the land concerned securing certain principal sums and interest. The execution of the charges was admitted, but the amount owing under them was disputed and, in particular, the default alleged (that payment of interest was in arrear) was denied. With the proceedings in this state, the application to sell the land could not proceed without ascertaining whether there was any default under the charges. This necessarily involves an enquiry into the amount of principal and interest owing and payable. The starting point for that enquiry must be what is recorded in the charges as to principal and interest. Consequently, the prohibition on acceptance of the charges as evidence in court effectively prevents this application from succeeding in the state of the evidence in these proceedings.

Another matter as to which the court would need to satisfy itself on this application is that the notice given under subsection (1) (which was exhibited in the evidence on affidavit) complied with the terms of the charge, as required by subsection (3). It does not seem possible, in the course taken so far in these proceedings, for the court to be so satisfied, if the charges cannot be accepted in evidence.

I express no views as to the possibility of the charges being enforced if extrinsic evidence of the charges and their terms was available, or whether such extrinsic evidence might also have to be rejected. That question has not arisen in these proceedings and cannot be answered until it is sought to tender specific extrinsic evidence, and the question has been properly argued.

I am aware that it may be difficult to reconcile what I have said as to the effect of section 3 of the Ordinance with some of the views expressed in the judgments of *Chong Cho* v. *Lau Kheok Chee* [5] as to the general effect of the Ordinance, including the effect of section 7(2) of the Ordinance. However, that was an action for the recovery of money lent and the evidence raised questions concerning section 7 as well as section 3. The present proceedings are for an order for sale under section 148 of the Land Code and what I have said is sufficient to dispose of this appeal against the refusal to make an order for sale. I prefer to express no opinions on the further questions raised by the peculiar draftmanship employed in the Ordinance, until they are actually in issue. Perhaps before that occurs, this much criticised Ordinance will have been replaced by more intelligible legislation.

For the reasons I have given, I consider that this application for leave to sell the respondent's land cannot succeed and I would dismiss this appeal with costs.

Tan Ah Tah F.J.: I have had the advantage of reading the judgment of the Chief Justice of Borneo. I agree with it and have nothing to add.

Appeal dismissed.

NESTLES PRODUCTS LTD. & ANOR. v. ASIA ORGANIZATION LTD. & ANOR.

[O.C.J. (Williams J.) June 10, 1965]

[Kuching — Civil Suit No. K. 13 of 1964]

Trade Mark — Alleged infringement — Passing off — Fraud — Necessity to plead.

The plaintiffs sought an injunction to restrain the defendants from passing off in Sarawak a particular milk product namely sweetened condensed milk known as "Liberty Brand" as sweetened condensed milk known as "Milkmaid Brand" the passing off having been done by the adoption of labels so similar in design printing colour and get up that the public could be easily misled and confused into mistaking "Liberty Brand" milk for "Milkmaid Brand" milk. The questions for determination were whether (a) the plaintiffs had established that the get-up of the labels on the tins of their milk (Milkmaid Brand) were distinctive of their product and (b) the get-up of the labels used by the defendants on the tins of their milk (Liberty Brand) would or were calculated to deceive a substantial number of the public into thinking that the milk offered by them was that of the plaintiffs.

Held: (1) the plaintiffs had discharged the burden placed on them to show that the get-up of the labels used on the tins of their milk were distinctive of their product;

(2) as there was no evidence of intent to deceive in this case, as fraud was not pleaded and as the plaintiffs have failed to prove that the labels used by the defendants had caused any deception or confusion, the injunction should not be granted.

Cases referred to:—

(1) *Claudius Ash, Sons & Co. Ltd.* v. *Invicta Manufacturing Co. Ltd.* (1912) 29 R.P.C. 465 at p. 475.

(2) *Midland Countries Dairy Ltd.* v. *Midland Dairies Ltd.* (1948) 16 R.P.C. 429.

(3) *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy* [1964] M.L.J. 99.

(4) *Norman Kark Publications Ltd.* v. *Odhams Press Ltd.* [1962] 1 All E.R. 638.

(5) *Payton & Co. Ltd.* v. *Snelling Lampard & Co.* Ltd. [1901] A.C. 308 at p. 311.

CIVIL SUIT.

S. K. Reddi for the plaintiffs.

T. H. A. Potts (*D. Ong* with him) for the defendants.

Williams J.: In this action which was commenced by a writ dated the 7th February 1964 the 1st plaintiff as manufacturer and the 2nd

plaintiff as the distributing agent in Sarawak seek to restrain, by way of injunction, the 1st and 2nd defendants from 'passing off' in Sarawak a particular milk product as theirs.

The case for the plaintiffs as first pleaded included an allegation of an infringement of a trade mark but that was withdrawn at the commencement of the hearing and the plaint was amended accordingly.

The case for the plaintiffs however was that the first plaintiff had for very many years produced certain milk products under the trade name of 'Milkmaid' and had in fact registered as a trade mark in Sarawak, on the 11th December 1964, a figure of a milkmaid carrying a pail on her head. [Ex.2]. A new and additional trade mark was registered on 31st March 1965 [Ex.3]. This trade mark was essentially the same as the older one but included red hatching inserted at an angle on each side of the figure of the milkmaid. It is this trade mark which is most material in so far as it forms part of the evidence of 'passing off' in this case. It figures prominently on the tins of milk in question.

One of the products marketed by the first plaintiff under the trade name of 'Milkmaid' is a type of sweetened condensed milk produced in round tins of 14 oz. weight. This milk goes under the general name of 'Milkmaid Brand' condensed milk and as such is undoubtedly a household word most certainly in Sarawak where the evidence shows it has been imported for 20 years and is a very popular brand.

It was then alleged that the first defendant as distributors in Singapore and the second defendant as their agent in Sarawak had sold and 'passed off' another type of sweetened condensed milk, known as 'Liberty Brand' as 'Milkmaid', the 'passing off' having been done by the adoption of labels so similar in design printing and colour and get-up that the public could be easily misled and confused into mistaking 'Liberty Brand' milk for 'Milkmaid Brand' milk.

Evidence was called to show that retailers in Sarawak made a point of placing these two products side by side and five specific instances of a mistake having occurred were put forward in proof of the plaintiffs' case.

In reply to this the defendants claimed that although 'Milkmaid Brand' milk was on the market in Singapore before they commenced selling 'Liberty Brand' milk they had not copied the design and layout of the labels on the earlier product and in doing so laid emphasis upon the differences between the two labels. They further explained that they had been importing and distributing this type of milk in Sarawak since 1954 and had in fact registered their own trade mark, the Statute of Liberty, hence the brand name, on the 5th June 1958.

The defendants further called witnesses, who varied from wholesalers to purchasers, to show that they had not been deceived nor considered themselves likely to be deceived by the labels used into mistaking one type of milk for the other.

Evidence was also given of the quite considerable sales which had taken place of 'Liberty Brand' milk in Sarawak, and indeed the whole of Malaysia, and of the quite considerable expense that had been incurred by way of the promotion of sales.

The crux of the case then lies upon my having to be satisfied upon two issues namely; (1) that the plaintiffs have established that the 'get up' of the labels on the tins of their milk are distinctive of their products, and (2) that the 'get up' of the labels used by the defendants on the tins of their milk will or is calculated to deceive a substantial number of the public into thinking that the milk offered by them is that of the plaintiffs.

As to the first point it was strongly urged upon me by Mr. Potts for the defendants that the plaintiffs had failed to discharge the burden that lay upon them. In particular he referred to the fact that Mr. Cathery, the leading witness for the plaintiffs, had only shown a personal knowledge of the labels used since 1963. There was too the fact that an alteration had been made to the plaintiffs' labels within the last 3 years or so by the addition of a cow's head in white on a red background in the form of a badge. He also made reference to a number of other milk products which bear labels similar in varying ways so both 'Milkmaid Brand' labels and 'Liberty Brand' labels. I might also add that some difficulty is caused by the variation that appears on the trade mark that was registered in March 1965, namely the red hatching which in a general way is common to both labels. This important feature may or may not have been in use prior to that date.

However I have not the slightest doubt that the form of label used on the tins marketed as 'Milkmaid Brand' has been substantially the same for a very long time. I am equally satisfied that that form become identified with the plaintiffs' product, and to that extent I am satisfied that the plaintiffs have discharged the burden placed upon them on that score.

As to the next point I will at once deal with the question of fraud as it is well established that where fraud is proved the court will not be too hesitant in coming to the conclusion that the intent to deceive has succeeded.

Yet although there were suggestions of fraud both in the evidence put forwarded by Mr. Cathery and in the cross-examination of Mr. Tan

Kim Jin, the first witness for the defendants, this allegation was not pleaded. It is of course a well established rule that if it is intended to set up fraud i.e., intent to deceive, then it must be explicity pleaded. The principal authority for this is to be found in the decision of Earl Loreburn L.C. in the case of *Claudius Ash, Sons & Co. Ltd.* v. *Invicta Manufacturing Company Ltd.*[1] where he said,

> "When once you establish the intent to deceive, it is only a short step to proving that the intent has been successful, that still it is a step even though it be a short step. To any such change there must be, however, two conditions. The first is that it ought to be pleaded explicitly so as to give the defendant an opportunity of rebutting the accusation of intent. The second is that it must be proved by evidence".

It is true that Harman J. in *Midland Counties Dairy Ltd.* v. *Midland Dairies Ltd.*,[2] appears to have thought otherwise. But I also have regard to the decision in *Kiaw Aik Hang Co. Ltd.* v. *Tan Tien Choy*[3] and in particular to the words of Buttrose J. at p. 101 where he said,

> "The case in my view must be decided on issues raised by the pleadings which bind the parties. If other issues are desired to be raised or come to light during the trial they must be pleaded by way of amendment."

I will but say here that no application was made in this case to amend the pleadings although the question of the necessity to plead an imputation of an intent to deceive was raised at quite an early stage of the proceedings; and thereafter the question of fraud was not pressed with any vigour to any useful conclusion.

Be that as it may it remains of course settled law that proof of an intent to deceive is not a necessary ingredient of success in an action for 'passing off'.

As to the likelihood of deception I have in mind that it is the effect of the 'get up' upon the ultimate purchaser that has to be considered and in this respect I also bear in mind that the ultimate purchaser in very many instances in Sarawak is not the English or Chinese educated person but rather the completely illiterate country dweller.

Thus then do I consider the labels, their similarities, disimilarities and the overall effect thereof upon prospective purchasers.

There can be no dispute that there is a similarity between the general pattern of the two labels as shown on the tins Ex. 4 and 6 respectively. There is the layout of 3 panels, the colour scheme of black and red upon white, the general spacing of the lettering and the central piece of a human figure. To that extent I am satisfied that there here been a copying of the 'Milkmaid Brand' labels by the defendants.

However the matter does not end there. Many of these features are to my mind not peculiar to Milkmaid labels. Thus do I speak of the layout of three panels and the general contents of the two back ones. Here, do I have special regard to the layout of the labels on the 'Teapot Brand' milk tin [Ex.11]. Surely a product beyond reproach. It is not lost upon me however that the delineation in that instance is not black but blue. But then too, and more particularly, there is the wording in English and Chinese. As far as the English wording goes nothing could more plainly mark the difference between the two products than the bold heading with its curved layout as adopted by 'Liberty Brand'. Then there is the presence of two Chinese characters in black type. It is true that the same characters, meaning condensed milk appear on the 'Milkmaid Brand' labels but they are in red, a most material factor, and appear on the back of the tin and not the front. Finally there is the central figure, the trade mark of each product. Here there can be no question but that they are different. In size they are about the same but their colouring differs and whilst one may well be described as a 'maid' the other is most certainly a 'matron'.

It has however been argued that despite these differences the overall pattern, or general image, is such that confusion can and has taken place.

In this respect I think that the plaintiffs here failed to make out their case. These goods have been in competition on the market in Sarawak for nearly 10 years. Yet only five instances of confusion have been shown and for reasons I shall give later none appears to carry any great weight. Furthermore it is by their very differences that these goods have become known on the market, and here I speak not of the English educated to whom the difference should be obvious, but of the illiterate Chinese and native population. Here the clear reference to 'Ang Jee' (Red Letter) and 'Oh Jee' (Black Letter), and to 'Susu Junjong' (a carrying on the head) and 'Susu Api' (fire/flame), each of which in the context of these labels has a meaning obvious in the extreme, and show that people are fully aware of what they are buying. Here then is a recognition of distinguishing features which one would naturally expect amongst the illiterate. There was it is true some suggestion by Mr. Cathery that there was a confusion in terminology in some instances where this test would not apply, namely the desscription of 'Liberty Brand' milk as 'Susu Junjong Murah' (Cheap Milkmaid). However this evidence was nebulous in the extreme and cannot carry any weight as against the evidence of the defence witnesses particularly that of Mr. Lim Siong Kia, of Haji Taha Road, Kuching, who deals with the Malay community. But even in that instance it is clear by the reference to price that it is the cheaper

product, namely 'Liberty Brand' that is being asked for.

As to the specific instance of mistake I would first refer to the evidence of the two English speaking witnesses, one of whom was a professional man. However in view of the difference that I have described I can but attribute the errors made by them to sheer and rudimentary inattention; and for this I do not think that the defendants can be held responsible. Thus in the case of *Norman Kark Publications Ltd.* v. *Odhams Press Ltd.*,[4] an action to prevent a 'passing off' of a magazine title, Wilberforce J. said when dealing with the principle here involved "As a subsidiary point it is enough to show that a substantial number of persons likely to become purchasers of the goods are liable to be deceived by the defendant's use of the name. On the one hand it is not necessary to show that all, or substantially all, persons in the market associate the name with the plaintiff's goods, if this can be shown of a substantial proportion of persons who are probably purchasers of the goods of the kind in question. On the other hand, that careless or indifferent persons may be led into error is not enough".

And here I would but add that even if it were proved that an unscrupulous retailer had deliberately so placed his goods that he might take advantage of such carelessness or indifference then I do not think that the manufacturer, could be held liable for that.

As to the other instances; Mr. Ong Ah Ann made an error of selection which has little meaning in this case. Whilst the instance of the lady who asked for 'Susu Junjong' and was, or was about to be, given 'Liberty Brand' milk is as much proof of a fraud by the retailer as anything else; and for that fraud again the manufacturers cannot be hold liable, *per* Lord Macnaughton in *Payton & Co. Ltd.* v. *Snelling, Lampard & Co. Ltd.*[5] Then as to the 'public competition', that is if anything strong evidence that the labels in question do not mislead as otherwise, as was argued by Mr. Potts, why was there no evidence of other such instances. Indeed to my mind that would have been the best type of evidence that the plaintiffs could have produced.

Finally I would but add that even if I am wrong on the above mentioned finding then, in the absence of fraud, I would not after all these years, when the plaintiffs must in all certainty have known what was going on, have been prepared to grant the remedy asked for. Indeed, if there was in truth any danger of confusion the long delay in commencing this action is, in any event, quite incomprehensible to me.

For the reasons given above I enter judgment for the defendants.

Judgment for the defendants.

TAN CHYE CHOO & ORS. v. CHEW KEW MOI

[O.C.J. (Azmi J.) June 16, 1965]

[Johore Bahru — Civil Suits Nos. 178, 179 & 180 of 1965]

Road traffic — Negligence — Breach of statutory duty — Mechanical defect in car not apparent to ordinary person — Motor Vehicles (Construction and Use) Rules, 1959.

These actions based on negligence and breach of statutory duty arose from a collision which took place between a motor-car and a taxi-cab belonging to the defendant as a result of which two passengers in the motor car were killed. It appeared that the taxi-cab went to the wrong side of the road, because of a mechanical defect caused as a result of incompetent workmanship carried out in changing the petrol engine to a heavy diesel engine and the subsequent modification of the front suspension thereby making it unsafe on the road and a danger to the public under rules 93 and 94 of the Motor Vehicles (Construction and Use) Rules, 1959. The defendant denied both negligence and breach of statutory duty and in the alternative averred that the defendant will, if the latter is upheld, object that the claim on that ground disclosed no cause of action against her.

Held: (1) the fact that the taxi-cab went to the wrong side of the road and ran into the car was sufficient *prima facie* evidence that the driver of the taxi-cab was negligent and it was therefore for the defendant to show or explain that what happened was not due to her driver's negligence. On the facts the defendant was not negligent merely because she used the taxi-cab which had a mechanical defect which was not apparent to the ordinary person. Besides she had permission of the registrar and inspector of motor vehicles to use it and the taxi-cab was inspected by the department who stated it was in a satisfactory condition. The defendant had done all that she could be expected to do and therefore the allegations of negligence must fail;

(2) the Motor Vehicles (Construction and Use) Rules, 1959, were not intended to impose an absolute obligation on the owners of vehicles to have them roadworthy in all events even in the absence of negligence and therefore the plaintiffs' claim for breach of statutory duty must fail.

Cases referred to:—

(1) *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832 at p. 841.

(2) *Monk* v. *Warbey & Ors.* [1935] 1 K.B. 75.

(3) *London Passenger Transport Board* v. *Upson & Anor.* [1949] A.C. 155.

(4) *Tan Siew Ting & Ors.* v. *Chong See Jin* (1956), 2 M.C. 247.

CIVIL SUITS.

D. Murphy for the plaintiffs.

K. E. Hilborne for the defendants.

Cur. Adv. Vult.

Azmi J.: I agreed with counsel that these three suits be consolidated and heard together.

It is not disputed that as a result of a collision between motor-car BG 1358 and taxi-cab H 814 on 28th January, 1962, at the 8th milestone Johore Bahru/Scudai Road, three passengers in the motor car, namely George Tan Eng Leong, John Sim Heng Teong, and Peter Lim Heng Loong received injuries and that George Tan